

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE: EQUIFAX, INC., CUSTOMER DATA SECURITY BREACH LITIGATION)	Case Number
)	1:17-md-2800-TWT
)	
)	
)	FINANCIAL INSTITUTION
)	ACTIONS

Transcript of a video/teleconference of the
Final Settlement Approval hearing before
The Honorable Thomas W. Thrash, Jr., Chief Judge
October 22, 2020; 2:07 p.m.
Atlanta, Georgia

(Appearances on page 2)

Proceedings recorded by mechanical stenography,
transcript produced by computer.

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P R O C E E D I N G S

THE COURTROOM DEPUTY: Court is again in session, the Honorable Thomas W. Thrash presiding.

THE COURT: All right. This is the case of In re: Equifax, Inc., Customer Data Security Breach Litigation, Case Number 17-md-2800.

First, let me ask counsel for the parties who intend to participate in this hearing to identify yourselves for the record and the parties you represent, beginning with the Plaintiffs.

MS. FERRON: My name is Maggie Ferron from Scott+Scott, Your Honor, and I represent the Financial Institution Plaintiffs.

THE COURT: Good afternoon, Ms. Ferron.

MR. ETZEL: Hello, Your Honor. I'm Jamison Etzel. I'm from Carlson Lynch, and I also represent the Financial Institution Plaintiffs.

THE COURT: Good afternoon, Mr. Etzel.

MR. GUGLIELMO: Your Honor, Joseph Guglielmo with Scott+Scott. I will not be speaking today, but I'm here with my colleague Gary Lynch as well as our liaison counsel, MaryBeth Gibson, also on behalf of Financial Institution Plaintiffs.

THE COURT: Good afternoon, counsel.

MR. HASKINS: Good afternoon, Your Honor. Stewart

1 Haskins with King and Spalding, on behalf of the Defendants,
2 Equifax.

3 THE COURT: All right. This is a hearing on the
4 Plaintiffs' Motion For Final Approval Of The Class Action
5 Settlement.

6 Who's going to be speaking for the Plaintiffs on
7 this? Is that you, Ms. Ferron?

8 MS. FERRON: I will, Your Honor, yes.

9 THE COURT: All right. I'll be glad to hear from
10 you.

11 MS. FERRON: All right. Just by way of beginning,
12 Mr. Etzel will be presenting the Motion For Attorneys' Fees,
13 Reimbursement Of Costs, And Service Awards.

14 I won't repeat what's in our papers. However, I
15 would like to highlight some key terms of the Settlement and
16 demonstrate to the Court that the Settlement is fair,
17 reasonable, adequate, and satisfies the six factors set forth
18 by the Eleventh Circuit in Bennett as well as Rule 23's
19 considerations.

20 To begin with, the terms of the Settlement are
21 favorable to the Class. The Settlement provides that each
22 Class Member is entitled to file a claim form and seek up to
23 \$4.50 per alerted-on card and up to \$5,000 in out-of-pocket
24 expenses.

25 The total amount available to the Class is

1 \$5.5 million. This amount is exclusive of the cost of notice
2 and administration fees, expenses, and any service awards.
3 These amounts are to be paid by Equifax in addition to the
4 \$5.5 million being made available to the Class Members.

5 The documented out-of-pocket costs can be either
6 reimbursement for fraudulent activity on alerted-on cards or
7 noncard-related costs. The noncard-related costs either
8 result from the theft of personally identifiable information
9 in the breach, such as opening fraudulent bank accounts, or
10 general breach-related expenditures, such as fraud detection
11 and customer authentication.

12 The claims process is currently ongoing. These
13 amounts in per-card reimbursement and the amount available
14 for fraud losses is greater than that provided by the
15 settlement of the Home Depot Data Breach Litigation, which
16 was approved by this Court. The Settlement is structured in
17 the same manner.

18 As set forth in Section 4.8 of the Settlement
19 Agreement, Equifax has agreed to commit \$25 million over two
20 years towards certain injunctive relief. The relief is
21 significant and it's tailored to prevent another data breach
22 from harming Financial Institution Class Members.

23 The monetary and injunctive relief provided by the
24 Settlement is designed to remedy the specific harm Plaintiffs
25 allege in the Complaint.

1 As I mentioned, the Notice and Claims Program is
2 underway. As is laid out in the Declaration of Analytics,
3 the Settlement Administrator, which is at ECF Number 1182-2,
4 notice was implemented consistent with the Court's Order
5 preliminarily approving the Settlement.

6 I'd like to update the Court on the Notice Program.

7 Following preliminary approval of the Settlement,
8 Analytics sent out 2,904 notice packets with claims forms via
9 U.S.P.S. on July 6th of this year. Six notices were
10 returned, and Analytics remailed notices for which they could
11 find new addresses.

12 After the mailing process, 99 percent of the Class
13 Members received U.S.P.S. notice.

14 Notice was also published in the American Bar
15 Association's Banking Journal. And these facts clearly show
16 that the Notice Program was robust and appropriate.

17 Analytics also established a settlement website and
18 an 800 number for Class Members who obtained information
19 about the Settlement, including deadlines to opt out, to
20 object, and to file a claim.

21 Class Members have been mailing their claims in and
22 submitting them online. As of October 16th, 113 claims have
23 been filed.

24 The deadline for Class Members to file a claim for
25 compensation isn't until the 31st of December of this year.

1 However, the deadline to opt out or object was September 2nd.

2 Only one opt-out was received, which was attached
3 as Exhibit D to the Analytics Declaration, and no objections.

4 We believe that the lack of any objection or any
5 significant number of opt-outs evidences the approval of the
6 Settlement by the Class and supports that the Settlement is
7 fair, reasonable, adequate, and warrants approval.

8 That brings me to the considerations that the Court
9 must look to in evaluating the Settlement.

10 Under both Rule 23 and the Bennett factors, the
11 Settlement is fair, adequate, reasonable, and should be
12 approved.

13 As to Rule 23, the Class representatives and Class
14 counsel have adequately represented the Class. The Class
15 representatives have produced discovery, participated in
16 settlement negotiations, and reviewed and approved
17 settlement.

18 They also have no interests adverse to any Class
19 Members. They're raising the same claims that arise out of
20 the same data breach.

21 And as set forth in the Joint Declaration of Class
22 counsel submitted in support of an award of attorneys' fees
23 at ECF 1157-1, Class counsel is highly experienced and
24 engaged in multiple rounds of briefing, depositions, document
25 review, and issued dozens of third-parties subpoenas.

1 Next, the Proposed Settlement was negotiated at
2 arm's length. It occurred in two stages: Before and after
3 denial of the Motion For Leave To Amend The Complaint.

4 We were assisted by Phillips ADR, a well-regarded
5 mediator, in the first round of negotiations.

6 Further, as set forth in the Settlement Chart we
7 submitted at ECF 1182-3, the Settlement compares favorably to
8 other financial institution data breach settlements that have
9 been approved by this Court and throughout the U.S.

10 Particularly when considering the substantial
11 costs, risks, and delays of trial and appeal, the Settlement
12 warrants final approval.

13 Finally, for Rule 23, the Class Members are treated
14 equitably. No Class Members are favored over others because
15 all card-issuing financial institutions can claim the same
16 relief.

17 And I would like to touch briefly on the Bennett
18 factors, to the extent that they raise any separate concerns.

19 As to the range of possible recovery, as we set
20 forth in our papers, the range of recovery tends to be from
21 \$1.50 per alerted-on card to \$3 per alerted-on card. So the
22 \$4.50 here is on the higher side of those settlements.

23 The \$25 million towards injunctive relief is also
24 significant as it will help in preventing a future data
25 incident.

1 As for opposition to the Settlement, there was no
2 -- there were no objections and just one opt-out.

3 The stage of the proceedings at which settlement
4 was reached was after three years, multiple rounds of
5 briefing, document review and depositions, and two stages of
6 settlement negotiations. And counsel is, therefore, highly
7 informed as to the value of the case.

8 As for Class certification, the Class should be
9 finally certified.

10 Numerosity is satisfied, as set forth in the
11 Analytics Declaration. There are about 2,900 Class Members,
12 which is well above and beyond the required 40.

13 Commonality is also satisfied because the factual
14 and legal questions all resolve around Equifax's conduct.
15 And this conduct doesn't differentiate between Class Members
16 at all. All card-issuing financial institutions will be
17 raising the same issues.

18 Typicality is satisfied because the claims of the
19 named Plaintiffs are the same as those of the Proposed Class.

20 The adequacy requirement is satisfied because the
21 named Plaintiffs have no interest antagonistic to that of the
22 Class.

23 Class counsel has been approved and secured a
24 favorable settlement.

25 Questions common to the Class predominate over

1 individual questions. The issue of Equifax's uniform conduct
2 towards all Class Members predominates over any other
3 inquiry.

4 There may be some diversity in damages issues, but
5 this generally doesn't defeat predominance.

6 And, finally, a Class action is a superior method
7 to litigate this case. It's better to resolve the claims of
8 all United States financial institutions that issued
9 alerted-on payment cards at once as opposed to thousands of
10 identical claims about Equifax's conduct.

11 Therefore, we respectfully request that the Court
12 grant Plaintiffs' Motion For Final Approval, and finally
13 certify the Class.

14 We believe the Settlement is an excellent result to
15 very hard-fought litigation.

16 And if Your Honor would like, we can submit a Word
17 version of the Proposed Final Order And Judgment for your
18 review and consideration following the hearing.

19 And if Your Honor doesn't have any questions, I
20 will now hand off to Mr. Etzel, who will argue for attorneys'
21 fees, expenses, and service awards.

22 THE COURT: All right.

23 Mr. Etzel.

24 MR. ETZEL: Thank you, Your Honor. And I am here
25 to address our request for approval of a \$2 million

1 attorneys' fee award, \$250,000 worth of expense
2 reimbursements, and service awards of \$1,500 to each of the
3 21 named Financial Institution Plaintiffs. And I'll address
4 those in order.

5 First, with our fee requests, we've proposed to the
6 Court to award \$2 million as a -- using the constructive
7 common fund approach. We're using a standard traditional
8 approach to the constructive common fund here. We've
9 calculated a constructive common fund of \$7.75 million.
10 That's comprised of the \$5.5 million in direct cash relief
11 that's been made available to Class Members plus the
12 \$2 million fee request and the \$250,000 expense request,
13 which if they were not being paid separately by Equifax,
14 would have been paid by the clients or the Class.

15 And as I briefly mentioned, all of these requests
16 are -- these amounts are to be paid separately by Equifax per
17 the Settlement Agreement. So they are not coming out of a
18 traditional common fund; they're coming out of Equifax's
19 agreement to pay these separate and on top of the
20 \$5.5 million in direct Class relief.

21 From our constructive common fund, we've also
22 excluded valuations of any injunctive relief. We've excluded
23 the cost of administration, which Equifax is also paying
24 separately; and we're excluding the value of the service
25 awards that we're requesting. So, again, it's a very

1 standard approach to the constructive common fund.

2 When you look at the fee requests divided into the
3 total constructive common fund, it represents a percentage
4 request of 25.8 percent. This is well in line with
5 traditional requests approved in Class actions.

6 To evaluate the reasonableness of the requests, the
7 Court will, of course, look at several factors that are laid
8 out in a couple of cases from the Eleventh Circuit. Johnson
9 v. Georgia Highway Express, and Camden I Condominium
10 Association v. Dunkle.

11 I'll just hit a few of the major factors quickly.
12 The first is the time and labor involved, and along with this
13 I'll also discuss the lodestar cross-check.

14 Counsel invested a significant amount of time in
15 this case. As of the end of June, we spent about 19,900
16 hours litigating this case. And these time reports were
17 submitted to the Court on a quarterly basis. So the Court
18 was apprised of what we were doing.

19 Multiplied by our firm's usual rates, that lodestar
20 value would be about \$11.2 million. So as the Court can see,
21 the actual fee request that we're seeking here represents a
22 significant discount compared to the amount of time that we
23 invested in the case, and that's a function of the fact that,
24 as the Court will recall, counsel proposed some more novel
25 theories when initially litigating this case. It involved

1 some departures from the typical payment card breach scenario
2 that involves a consumer goods merchant.

3 So as the Court saw through our -- through
4 Equifax's Motion to Dismiss briefing and our request to amend
5 the Complaint after the Court's initial Order on that motion,
6 the scope of the claims that we initially brought were
7 narrowed by the Court's Order. So the negative multiplier is
8 a reflection of that, a partial success on the part of Class
9 counsel.

10 But we did invest a significant amount of time in
11 investigating the case, filing complaints, proceeding in
12 front of the JPML, responding to the Motion to Dismiss,
13 drafting the Consolidated Complaints, which were rather
14 lengthy, and then we did a fair amount of discovery in this
15 case too. There was document discovery, and we were in the
16 midst of depositions at the time we reached settlement.

17 So the overall time and labor that counsel devoted
18 to this case definitely, I think, supports the fee requests
19 here.

20 Just a couple of other factors to touch on: the
21 novelty and difficulty of the factual and legal questions
22 involved.

23 As I already mentioned, this was a slightly
24 different case than the traditional payment card breaches
25 that our firms have litigated before, including in this court

1 and in the In re: Home Depot case.

2 So as the Court may recall from the Motion to
3 Dismiss hearing, we got into some questions about the
4 application of traditional principles, like the scope of
5 Equifax's duty to Financial Institution Plaintiffs. We were
6 essentially testing the limits of some of these theories. So
7 there were some novel difficult questions involved.

8 The skill required and the experience, reputation
9 and ability of counsel.

10 Our two firms, Carlson Lynch, Scott+Scott, along
11 with the team of co-counsel that we had, have a lot of
12 experience in these type of cases. We were involved in the
13 Target data breach, the Home Depot data breach, Wendy's,
14 Eddie Bauer, several other cases that, again, fit -- fit the
15 payment card data breach fact pattern, which this is a slight
16 variation on.

17 But we've also submitted our resumes detailing our
18 experience in other types of complex and class litigation,
19 and our firms have a pretty strong and lengthy reputation in
20 this type of work.

21 The type -- excuse me. The customary fee amount,
22 the contingent nature of the fee, and preclusion of other
23 employment.

24 Again, the 25.8 percent that we're requesting
25 against the common fund is well within the normal range that

1 plaintiff attorneys who work on contingent fees normally
2 seek, which is traditionally between 20 and 40 percent,
3 depending on the type of case. So we're well within that
4 range and closer to the low end of that range.

5 We did take the case on on a contingent nature. We
6 bore the risk of any failure or lack of success on the
7 claims, and some of that is demonstrated again in the
8 fractional multiplier that we have here.

9 Time limitations imposed by the client of
10 circumstances.

11 We did our best here to keep the case moving. And
12 as the Court is aware, this litigation proceeded in parallel
13 with the claims brought by consumers. We did our best to
14 make sure we kept up with the schedule laid out by the Court,
15 which enabled some coordinated proceedings, such as the
16 Motion to Dismiss hearing, the initial leadership hearing,
17 which were both conducted in tandem with the other tracks,
18 and I think that, you know -- that helped save some
19 efficiencies on the part of the Court and perhaps the
20 Defendant as well.

21 Finally, the amount involved, the results obtained,
22 and awards in similar cases.

23 As my colleague already mentioned, the recovery
24 here on a per-card basis compares very favorably to the ones
25 recovered in Home Depot and Wendy's and some of the other

1 cases we've listed in our brief. So although the scope of
2 the case was narrowed, we still received a pretty strong
3 recovery for the Class Members with respect to the claims
4 that were pending at the time we reached agreement.

5 Moving on, I'd like to quickly address our expense
6 reimbursement requests.

7 Class counsel and co-counsel incurred \$278,000 in
8 expenses and change, and that was at the end of June. Again,
9 our expenses were reported to the Court on a quarterly basis.

10 The bulk of the expenses were for items like
11 eDiscovery, travel for court hearings and depositions, and
12 attending the mediation and mediator fee.

13 We did our best to keep expenses low because,
14 again, due to the contingent nature of the case, we bore the
15 risk that we would not be able to get any reimbursement in
16 the event that the case was unsuccessful.

17 The overall amount of the expenses is reasonable in
18 light of the total value of the Settlement. It's only about
19 five percent of the total when compared to the total cash
20 relief available to the Class Members.

21 And, again, Equifax has agreed to pay this amount
22 separately. So it's not reducing any Class Member's
23 recovery.

24 Finally, I think the last request that I'd like to
25 address is our service award request. We're requesting

1 \$1,500 for each of the 21 named Financial Institution
2 Plaintiffs.

3 And as we mentioned in a reply brief that we filed,
4 I think it was a week or two ago, we did want to bring to the
5 Court's attention a recent panel decision from the Eleventh
6 Circuit that discussed service awards -- well, incentive
7 awards, as they referred to in that case. The case name was
8 Johnson v. NPAS Solutions LLC.

9 In that case, a two-member panel found that the
10 \$6,000 incentive award requested by the named plaintiff in
11 that case was akin to a salary or bounty and was prohibited
12 under some Supreme Court precedents, and we discussed these
13 pretty thoroughly in our reply brief.

14 We wanted to raise a couple of points of
15 distinction which we think allow the Court to award our
16 requested service awards here.

17 First of all, the Johnson case was a true common
18 fund case. So the incentive award requested by that named
19 plaintiff was actually reducing the amount of the benefits
20 available to the Class Members.

21 This is not that type of case. Again, Equifax has
22 agreed to pay the amount separately. So they're not -- if
23 the Court awards them, they do not reduce any Class Member's
24 recovery at all.

25 Also, there are no objections in this case, whereas

1 there was a rather vigorous objection in the Johnson case.

2 If the Court is more interested in that issue, our
3 brief also goes into the Supreme Court case that the Johnson
4 panel relied on, and we identify some other points of
5 distinction there.

6 The individual in the original Supreme Court case,
7 which was Trustees v. Greenoff, that individual was seeking a
8 salary for ten years' worth of work and private hotel and
9 railroad expenses. And in today's money, the amounts that he
10 was requesting were hundreds of thousands of dollars.

11 So the service awards here are really just to
12 recognize that these named Plaintiffs were actually -- would
13 be at a detriment if they weren't awarded because of the time
14 they put into the case.

15 They're not asking for a salary or a bonus or
16 anything like that. They're asking for basically a token
17 recognition that they did services that benefited the Class,
18 and without those awards, they would essentially be at a
19 detriment because they wouldn't be getting anything other
20 than the same Class relief available to everyone else, which
21 is, you know, \$4.50 a card plus the expenses or the -- yeah.

22 So unless the Court has any questions, I think
23 that's basically all I had to present. We just ask for the
24 Court to award \$2 million in attorneys' fees, \$250,000 in
25 expense reimbursements, and \$1,500 to each of the 21 named

1 Plaintiffs.

2 THE COURT: Mr. Haskins.

3 MR. HASKINS: Thank you, Your Honor. Obviously,
4 Equifax supports the Settlement. But unless you have any
5 specific questions, I don't have anything to add to the
6 presentations from Plaintiffs' counsel.

7 THE COURT: All right.

8 Does anybody want to be heard in opposition to the
9 Motion For Final Approval Of The Class Action Settlement?

10 (No response.)

11 THE COURT: Does anybody want to be heard in
12 opposition to the Plaintiffs' Motion For Approval Of The
13 Attorneys' Fees, Expenses, And Incentive Awards?

14 (No response.)

15 THE COURT: All right. I'm going to grant the
16 Financial Institution Plaintiffs' Motion For Final Approval
17 Of The Class Action Settlement. I think under the standards
18 set by Rule 23 and the Bennett case, I think the Settlement
19 is fair, reasonable and adequate, and should be approved.

20 With respect to the Rule 23 factors, I believe the
21 Class was more than adequately represented. The Proposed
22 Settlement was negotiated at arm's length under the oversight
23 of former Judge Layn Phillips.

24 I think the relief obtained was fair, reasonable
25 and adequate. It provides up to \$4.50 per alerted card and

1 up to \$5,000 for fraud losses. I think that's an excellent
2 result that's comparable to or even more favorable than other
3 data breach settlements.

4 I think the Settlement is fair and reasonable
5 considering the risks, costs and delay of continued
6 litigation. The Plaintiffs' fortunes in this case, to put it
7 mildly, went up and then went down and then tried to go up
8 again and only made it a little way.

9 So I think particularly considering the risk of
10 continued litigation, I think the Settlement is an excellent
11 one. I think the method of distributing relief is effective,
12 and the terms relating to the attorneys' fees are reasonable,
13 as I'll get into in greater detail.

14 Finally, under the Rule 23 factors, I think the
15 Class Members are treated equitably relative to each other.

16 Regarding the Bennett factors, I think considering
17 the likelihood of success at trial, the Settlement is an
18 excellent one.

19 Considering the range of possible recoveries,
20 again, I think the Settlement is fair, reasonable and
21 adequate.

22 Given the point at which the Settlement was reached
23 in the course of the litigation, in considering the
24 complexity, the expense and duration of the litigation, I
25 think that the Settlement is an excellent one.

1 I think the fact that there were no objections from
2 the Class Members raised is in favor of approving the
3 Settlement.

4 And, finally, I think that the Rule 23(a)
5 requirements are all met and the requirements for
6 Rule 23(b)(3) are also satisfied.

7 So for those reasons, I will approve the
8 Settlement.

9 And, Ms. Ferron, if you would submit a proposed
10 written order summarizing and perhaps elaborating on the
11 factors that you have analyzed in your presentation and get
12 Mr. Haskins' approval as to form, I'll be glad to sign it.

13 MS. FERRON: Will do, Your Honor.

14 THE COURT: All right. I'm also going to grant the
15 Plaintiffs' Motion For Attorneys' Fees, Expenses And Service
16 Awards.

17 I think the requested fee of \$2 million should be
18 approved because it's reasonable and supported by the
19 relevant factors.

20 As Mr. Etzel set forth, the requested fee is
21 approximately 25 percent of the constructive common fund that
22 is created in this case without taking into consideration the
23 value of any of the injunctive relief.

24 And I think the fee is appropriate, considering the
25 Johnson factors, including the time and labor involved, the

1 novelty and difficulty of the factual and legal questions
2 involved, the skill required, and the experience, reputation
3 and ability of counsel. I think the fee is within the range
4 of the customary fees for such settlement, the time
5 limitations imposed by the circumstances of the case, and
6 awards in similar cases.

7 I think the requested fee is supported by the
8 lodestar cross-check, which shows that actually counsel put
9 in more time if compensated according to their standard
10 hourly rates than the fee that they are actually requesting,
11 in fact, substantial more time.

12 I think the requested expenses are reasonable and
13 were necessary to prosecute the litigation.

14 Finally, I think the service awards are reasonable
15 and appropriate to recognize that the named Plaintiffs did
16 incur significant costs in prosecuting the litigation.

17 And I think this case is distinguished from the
18 recent Eleventh Circuit Johnson case because the service
19 awards are not coming out of the settlement portion that is
20 being awarded to the Members of the Class. It's been
21 negotiated separately and is to be paid by Equifax separate
22 and apart from the Settlement that goes to the Class Members.

23 So for all of those reasons, I'm going to approve
24 the request for fees, expenses, and the incentives awards.

25 And, Mr. Etzel, if you'll prepare a written order

1 that summarizes what I've said today, and you may elaborate
2 upon factors you mentioned in requesting approval of the
3 award, present it to Mr. Haskins for approval as to form, and
4 present it to me, I'll be glad to sign it.

5 MR. ETZEL: I will do that, Your Honor.

6 THE COURT: All right. Counsel, it's been a long
7 way from the telephone call asking me if I would accept this
8 MDL case. It's not over yet, but we've made some progress.

9 So I appreciate everybody's professionalism and
10 excellence in your representation of your respective clients.

11 And unless y'all have anything else, that will
12 conclude the hearing.

13 MS. GIBSON: Thank you, Your Honor.

14 MR. HASKINS: Thank you, Your Honor.

15 MR. GUGLIELMO: Thank you, Your Honor.

16 THE COURT: All right. Thank you very much.

17 That concludes the hearing, and court's in recess
18 until further order.

19 (Proceedings concluded at 2:40 p.m.)

20 - - - - -

21 Reporter's Certification

22 I certify that the foregoing is a correct transcript from the
23 record of proceedings in the above-entitled matter.

24 s/Diane Peede, RMR, CRR, CRC
25 Official Court Reporter
United States District Court
Northern District of Georgia

Date: October 23, 2020